

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERNADEAN RITTMANN, *et al.*,

Plaintiffs,

v.

AMAZON.COM INC. and AMAZON
LOGISTICS, INC.,

Defendant(s).

Consolidated Action
Case No. C16-1554-JCC

**PLAINTIFF IAIN MACK'S
REPLY IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

ORAL ARGUMENT
REQUESTED

IAIN MACK, *et al.*,¹

Plaintiffs,

v.

AMAZON.COM INC. and AMAZON
LOGISTICS, INC.,

Defendant(s).

¹ Plaintiff Mack now adds the original caption of his case to clarify that this motion for partial summary judgment is brought by Mack for his complaint that was consolidated with the Rittmann v. Amazon action.

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I. INTRODUCTION

Defendant Amazon.com Inc. and Amazon Logistic Inc.’s (collectively, “Amazon”) Opposition to Plaintiff Mack’s Motion for Partial Summary Judgment raises a host of meritless and unpersuasive arguments. Amazon utterly fails to raise any material dispute or fact or legal argument that could preclude a finding that Amazon Flex delivery drivers are Amazon’s employees under the ABC test set out in Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 934 (Cal. 2018), and codified by the California Legislature in Assembly Bill 5 (“AB5”), Cal. Lab. Code § 2775. Plainly, under Prong B of the test, Amazon Flex drivers in California undoubtedly perform work that is within “the usual course” of Amazon’s business, by delivering Amazon packages and fulfilling orders. The ABC test applies retroactively through Dynamex to wage and hour claims brought under the Private Attorney General Act of 2004 (“PAGA”), Lab. Code, § 2698 *et seq.*, and further, PAGA deputizes Plaintiff Mack to pursue relief for current Amazon Flex drivers who are unquestionably subject to AB5. Further, Amazon has utterly failed to manufacture any issue of fact (or explain why *it* would need discovery) regarding whether the AB5 “business-to-business” exemption applies to Amazon Flex drivers—it plainly does not. Finally, this Court must reject Amazon’s frivolous argument that Proposition 22 is retroactive or that it would preclude a finding that Amazon is liable (at the very least, for the period before it went into effect). The Court should grant Plaintiff Mack’s motion for partial summary judgment on the issue of California Amazon Flex drivers’ employee status under the ABC test.

II. ARGUMENT

A. Amazon Flex Drivers Perform Deliveries in the Usual Course of Amazon’s Business

Amazon has failed to raise any genuine dispute of material fact to undermine the clear conclusion that the service performed by Amazon Flex drivers, the delivery of Amazon packages to customers, is within its usual course of business. First, Amazon Flex delivery drivers perform their work within the usual course of Amazon’s business because Amazon

1 “holds itself out” as, and “proclaims” its business to be, “fulfillment” and “delivery” of items
 2 that customers purchase on Amazon.com. Vazquez v. Jan-Pro Franchising Int’l, Inc., 986 F.3d
 3 1106, 1125 (9th Cir. 2021); see also Dkt. 166.03, Ex. C to Liss-Riordan Decl., at 3 (“We
 4 fulfill customer orders in a number of ways . . .”; “We seek to offer our customers low prices,
 5 fast and free delivery . . .”); id. at 9 (describing Amazon’s “ability to . . . fulfill orders”, and
 6 “the extent to which [it] offer[s] fast and free delivery” and “invest[s] in . . . fulfillment” as
 7 key factors to its growth rate); id. at 19 (“To increase sales of products and services, we focus
 8 on improving all aspects of the customer experience, including . . . faster delivery . . .”).

9 Amazon argues that the caselaw requires the drivers to be “necessary” to Amazon’s
 10 business; on the contrary, that is one way to show that the services they provide are within
 11 Amazon’s usual course of business, but it is not required. Vazquez, 986 F.3d at 1125-26.
 12 Indeed, in Lawson v. GrubHub, 302 F. Supp. 3d 1071, 1073, 1090 (N.D. Cal. 2018), the court
 13 concluded that the plaintiff’s services as a delivery driver were within GrubHub’s usual
 14 course of business, even though GrubHub had existed for years as a food ordering platform
 15 without any delivery drivers (which was a recent addition to its business, just as Amazon Flex
 16 drivers are a relatively recent addition to Amazon’s business). Here, a “common-sense
 17 observation of the nature” of Amazon’s business is that it provides efficient delivery of items
 18 that customers order online, in part through Amazon Flex drivers. Vazquez, 986 F.3d at 1125.

19 Amazon suggests that its employment of Amazon Flex drivers is more akin to hiring
 20 third-party contractors like FedEx, UPS, and the U.S. Postal Service to complete deliveries of
 21 Amazon packages. See Amazon’s Opposition to Motion for Partial Summary Judgment, at 2
 22 (“Opposition”). However, this is not an apt comparison where Amazon has effectively
 23 brought the delivery service “in-house” through its Amazon Flex drivers. Thus, Amazon Flex
 24 drivers are much more akin to the mattress delivery drivers that were found to be employees
 25 of Sleepy’s LLC, a mattress company, under Prong B of New Jersey’s ABC test. See
 26 Hargrove v. Sleepy’s, LLC, 2016 U.S. Dist. LEXIS 156697 (D.N.J. 2016). In Hargrove, the

1 court found that mattress delivery drivers worked within “the usual course of business” of
 2 Sleepy’s LLC, a mattress company. Id. at *10. The court recognized that Sleepy’s LLC was
 3 not “a trucking company, but part of its marketing scheme is quick delivery of mattresses and
 4 other mattress accessories.” Id. The court concluded that “Sleepy’s is engaged in the mattress
 5 business, and an integral part of its business is the delivery,” therefore, its delivery drivers
 6 worked within the company’s usual course of business. Id. at *10-11. Here, too, an integral
 7 part of Amazon’s self-described business and marketing scheme is the “quick delivery” of
 8 Amazon packages that Amazon’s customers order on Amazon.com, and therefore, Amazon
 9 Flex drivers clearly provide this delivery service within Amazon’s usual course of business.¹

10 Plainly, Amazon “derives profits” directly from the delivery services that Amazon
 11 Flex drivers provide (even if customers do not always pay additionally for delivery). Vazquez,
 12 986 F.3d at 1125-27. Amazon’s use of Amazon Flex drivers is wholly unlike a company
 13 hiring “traditional contractors like electricians and plumbers, who perform incidental services
 14 for otherwise unrelated businesses”, because when a company contracts with a plumber to
 15 make repairs in the company’s headquarters, the company’s customers are not paying for nor
 16 benefitting from this service. Vazquez, 986 F.3d at 1125; Dynamex, 4 Cal. 5th at 959-960.

17 Nor is it compelling for Amazon to argue that Amazon Flex delivery drivers are a
 18 “cost” to Amazon. See Opposition, at 2. All employees are a “cost”, as the employer must pay
 19 them wages in exchange for labor. Dynamex, 4 Cal. 5th at 934. Here, there can be no question
 20 that Amazon Flex drivers perform their work within Amazon’s “usual course of business” and
 21 are thus Amazon’s employees. Amazon has failed to raise any dispute of material fact to the
 22 contrary (nor shown why *it* needs discovery for such a dispute to be decided).

23
 24
 25 ¹ Indeed, one of the most well-known Amazon products is an Amazon Prime
 26 membership, which is ***a subscription to fast and free delivery service for Amazon orders*** that
 customers can purchase independently of any physical product. Ex. C, at 3. Given that
 Amazon sells a standalone subscription to an upgraded ***delivery service***, it is disingenuous for
 Amazon to contend that it is not in the delivery business, as part of its retail operation.

B. Whether Amazon Flex Drivers Perform Work within Amazon’s Usual Course of Business is Amenable to Determination for All Amazon Flex Drivers

Amazon’s insistence that Plaintiff Mack must produce evidence regarding every single Amazon Flex driver in California in order to prevail on summary judgment under Prong B is misguided. Whether a specific group of employees working for one employer are properly classified as employees or independent contractors is amenable to determination on a unitary basis. See People v. Uber Technologies, Inc., 56 Cal. App. 5th 266, 275 (Cal. Ct. App. 2020).²

Indeed, People v. Uber was a case brought by the State of California to enjoin Uber and Lyft from misclassifying all of their California drivers as independent contractors under AB5. Id. This is exactly the kind of action that PAGA authorizes Plaintiff Mack to bring here, on behalf of the state, for all Amazon Flex drivers in California. Arias, 46 Cal.4th at 969 (“An employee plaintiff suing... under [PAGA], does so as the proxy or agent of the state’s labor law enforcement agencies.”); Williams v. Superior Court, 3 Cal. 5th 531, 538-539 (Cal. 2017) (noting that a plaintiff bringing a PAGA action is bringing “a representative action on behalf of himself or herself and other aggrieved employees”). In People v. Uber, which was **not** a class action, the California Court of Appeal affirmed the lower court’s holding that, under the preliminary injunction standard, the People had shown an “overwhelming likelihood” that Uber and Lyft had misclassified **all** of their California drivers as independent contractors under the AB5 ABC test, simply by looking solely at Prong B. Id. at 312. Here, too, Amazon cannot possibly show that AmazonFlex delivery drivers as a group perform work “outside the usual course” of Amazon’s business, which is fulfilling customers’ online orders.

C. Amazon Flex Drivers Do Not Fall under the AB5 “Business-to-Business” Exception

Apparently recognizing that Amazon Flex drivers are surely Amazon’s employees under the ABC test, Amazon makes a last-ditch argument that *perhaps* some Amazon Flex

² Importantly, the law is clear in California that a plaintiff does not need to satisfy class certification requirements to prevail on a PAGA claim, which is representative by its nature. See Arias v. Superior Court, 46 Cal.4th 969, 975 (Cal. 2009).

1 drivers fall within the “business-to-business” exemption of AB5 and therefore summary
 2 judgment cannot be granted. See Opposition, at 15. This argument must fail because Amazon
 3 has not raised—and could not possibly raise—any genuine material dispute of fact about
 4 whether the AB5 “business-to-business” exemption applies to *any* Amazon Flex driver.

5 Indeed, Amazon’s Opposition does not even attempt to show how this exemption
 6 could apply, because doing so would make it eminently clear it does not. The “business-to-
 7 business” exemption **only** applies if the **presumptive employer satisfies all 12 conditions**
 8 (thus it is immaterial if Amazon may satisfy *some* of the conditions for *some* of the drivers):

9 (1) The business service provider is free from the control and direction of the
 10 contracting business entity in connection with the performance of the work,
 both under the contract for the performance of the work and in fact.

11 (2) The business service provider is providing services directly to the
 contracting business rather than to customers of the contracting business. This
 12 subparagraph does not apply if the business service provider’s employees are
 solely performing the services under the contract under the name of the
 13 business service provider and the business service provider regularly contracts
 with other businesses.

14 (3) The contract with the business service provider is in writing and specifies
 the payment amount, including any applicable rate of pay, for services to be
 performed, as well as the due date of payment for such services.

15 (4) If the work is performed in a jurisdiction that requires the business service
 provider to have a business license or business tax registration, the business
 16 service provider has the required business license or business tax registration.

17 (5) The business service provider maintains a business location, which may
 include the business service provider’s residence, that is separate from the
 business or work location of the contracting business.

18 (6) The business service provider is customarily engaged in an independently
 established business of the same nature as that involved in the work performed.

19 (7) The business service provider can contract with other businesses to provide
 the same or similar services and maintain a clientele without restrictions from
 20 the hiring entity.

21 (8) The business service provider advertises and holds itself out to the public as
 available to provide the same or similar services.

22 (9) Consistent with the nature of the work, the business service provider
 provides its own tools, vehicles, and equipment to perform the services, not
 including any proprietary materials that may be necessary to perform the
 23 services under the contract.

24 (10) The business service provider can negotiate its own rates.

25 (11) Consistent with the nature of the work, the business service provider can
 set its own hours and location of work.

26 (12) The business service provider is not performing the type of work for
 which a license from the Contractors’ State License Board is required,
 pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the
 Business and Professions Code.

1 Cal Lab Code § 2776. Even a cursory glance at this list of requirements makes it clear that it
 2 does not apply to any Amazon Flex drivers. For example, the tenth requirement is that “[t]he
 3 business service provide can negotiate its own rates.” Amazon Flex drivers unquestionably do
 4 not negotiate their own rates, and Amazon nowhere contends that they do. See generally
 5 Opposition. Amazon unilaterally determines that rate of pay for Amazon Flex delivery
 6 drivers. See Dkt. 167, Declaration of Ian Mack, ¶ 8 (“Amazon determined the rate of pay for
 7 my delivery work, which I was told was \$18/hour when I started in 2017.”). Additionally, the
 8 eleventh requirement is that “the business service provider can set its own hours and location
 9 of work,” which is clearly inconsistent with the work of Amazon Flex delivery drivers, who
 10 are required to pick up packages at the Amazon warehouse and then deliver these packages to
 11 Amazon’s customers on a predetermined route set by Amazon. Id. ¶¶ 14-15.

12 Moreover, the California Legislature did not intend to exempt Amazon Flex drivers in
 13 enacting the “business-to-business” exemption. In People v. Uber, the court noted, “[u]nder
 14 the familiar maxim of statutory construction *expressio unius est exclusio alterius* had the
 15 Legislature meant to exempt Defendants’ well-known ride-hailing businesses, it would have
 16 done so explicitly.” 2020 Cal. Super. LEXIS 152, at *36 n.16 (Cal. Sup. Ct. Aug. 10, 2020).
 17 Had the Legislature intended to exempt Amazon from AB5, it would have done so explicitly.

18 ***D. The Dynamex ABC Test Applies Retroactively, Including to PAGA Claims***

19 Amazon disingenuously contends that the ABC test for determining employee or
 20 independent contractor status that the California Supreme Court adopted in Dynamex cannot
 21 be applied retroactively to Plaintiff’s claims. This argument clearly fails. In Vazquez, 10 Cal.
 22 5th at 944, the California Supreme Court held that Dynamex applies retroactively.

23 The California Court of Appeal in Gonzales v. San Gabriel Transit, Inc., 40 Cal. App.
 24 5th 1131 (Cal. Ct. App. 2019), review dismissed, Gonzales v. San Gabriel Transit---P.3d ---,
 25 2021 WL 1031870 (Cal. 2021), determined that the Dynamex ABC test applies to Labor Code
 26

1 claims that are either “rooted in one or more wage orders, or predicated on conduct alleged to
 2 have violated a wage order.” 40 Cal. App. 1157; id. at 1160 (“[i]n a wage and hour action
 3 where the purposes served by the Labor Code and wage order provisions are coextensive,
 4 there is no principled reason to treat the claims differently”). Where a Plaintiff brings PAGA
 5 claims “for violation of the minimum wage laws, etc., he or she is actually enforcing the
 6 Labor Code which, by its own terms, incorporates the wage orders.” Johnson v. Vcg-Is, 2019
 7 Cal. Super. LEXIS 5, at *9 (Cal. Sup. Ct. Feb. 1, 2019). Thus, the California Supreme Court’s
 8 Dynamex “holding that the ABC test should be applied to determine employee status under
 9 the wage orders can only mean that that test also had to be applied to Labor Code claims
 10 seeking to enforce the wage order requirements.” Id. at *10. “The fact that the case is brought
 11 under PAGA does not compel a different result. PAGA claims are based on violations of the
 12 Labor Code which, in turn, requires compliance with the wage orders.” Id.

13 In Gonzales, the court went on to determine that the ABC test applied to the plaintiffs’
 14 expense reimbursement claim under Labor Code section 2802, because they are encompassed
 15 by the wage orders. 40 Cal. App. 5th at 1157, 60. In Dynamex itself, the court noted that “the
 16 wage order definitions of the employment relationship apply in civil actions for unpaid
 17 minimum or overtime wages under [California Labor Code] section 1194” and went on to
 18 hold that the ABC test applies to determining employment status under this section. 4 Cal. 5th
 19 903, 940, 957. These are the exact violations for which Plaintiff Mack seeks civil penalties
 20 under PAGA. Thus, the Dynamex ABC test necessarily also applies Plaintiff’s Mack’s claim.

21 Not only does the ABC apply under Dynamex, but it also applies under AB5, which is
 22 clearly itself retroactive, since it states that it is a codification of “existing law”. See James v.
 23 Uber Techs., Inc., 2021 U.S. Dist. LEXIS 14642, at *50 (N.D. Cal. Jan. 26, 2021). In any
 24 event, there can be no question that AB5 applies to the classification of Amazon Flex drivers
 25 after the date AB5 went into effect, and as a PAGA representative of the state, Plaintiff Mack
 26 is deputized to vindicate the rights of **all** Amazon Flex delivery drivers, including those whose

rights under AB5 have been violated since the statute’s enactment. Arias, 46 Cal. 4th at 969 (“An employee plaintiff suing... under [PAGA], does so as the proxy or agent of the state’s labor law enforcement agencies.”). In Kim v. Reins International California, Inc., the California Supreme Court held that a PAGA representative who even settled her own individual claims still maintained standing to pursue her PAGA action, even if she herself does not have an unredressed injury because her interest as a PAGA representative *includes the state’s interest in enjoining unlawful conduct*. 9 Cal. 5th 73, 90-91 (Cal. 2020). Kim makes clear that, as a PAGA representative, Plaintiff Mack has assumed the protectable interest of the state and public; even if he had no personal interest in this case (which he plainly does as an aggrieved employee), he would still have a significant and protectable interest in rectifying Amazon’s *past and ongoing* Labor Code violations in his capacity as a representative of the State of California. Id. at 86 (“The state can deputize anyone it likes to pursue its claim, including a plaintiff who has suffered no actual injury.”). Thus, PAGA has deputized Plaintiff Mack, as an aggrieved employee himself and a representative of the state, to enforce current wage laws against Amazon on behalf of all Amazon Flex delivery drivers, including those who have worked more recently for Amazon, after the enactment of AB5. See Reyes v. Macy’s, Inc., 202 Cal. App. 4th 1119, 1123 (Cal. 2011) (“A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and **include other current or former employees.**”) (emphasis added). Thus, it is simply irrelevant that Plaintiff Mack himself worked for Amazon before 2018.

E. Proposition 22 Is Inapplicable to Amazon Flex Drivers’ Employee Status

Amazon next attempts to skirt the straightforward application of the ABC test by invoking Proposition 22, the ballot initiative into which rideshare and food delivery companies such as Uber, Lyft, and DoorDash poured hundreds of millions of dollars to try to avoid application of AB5 to their businesses. However, these companies’ self-serving effort to try to exempt their businesses from AB5 is reflected in the narrow language of Proposition 22,

1 which by its clear terms does not apply to Amazon Flex Drivers—and is not retroactive.

2 **1. Proposition 22 does not apply to Amazon Flex delivery drivers**

3 Amazon cannot possibly show that Proposition 22 applies to Plaintiff Mack nor any
 4 Amazon Flex driver. Proposition 22 only applies to “app-based” delivery drivers who are
 5 “provided with the option to accept or decline each delivery request” on the “Delivery
 6 Network Company” app and is not required “to accept any specific delivery request as a
 7 condition of maintaining access” to the app.³ Amazon Flex delivery drivers are plainly not
 8 given the opportunity to “accept or decline each delivery request” that they perform for
 9 Amazon. Instead, at the beginning of each shift (or “block”), Amazon assigns the Amazon
 10 Flex driver between 30-100 packages that the driver must deliver.⁴ See Mack Decl. at ¶ 4. If
 11 an Amazon Flex driver does not complete one of these assigned deliveries during the “block”,
 12 the driver can be reprimanded. Id. ¶ 6. Thus, Amazon Flex drivers are certainly not “provided
 13 with the option to accept or decline each delivery request” in the course of their work. Thus,
 14 the Proposition 22 defense to employment misclassification (which was written by and for
 15 companies like Uber, Lyft, and DoorDash, which generally allow drivers to decide whether to
 16 accept each particular ride or delivery) simply does not apply to Amazon.

17 **i. Proposition 22 does not apply retroactively.**

18 Moreover, even if Proposition 22 applied to Amazon (which it does not, for the
 19 reasons discussed above), Amazon’s suggestion that Proposition 22 applies retroactively prior
 20 to the date it was enacted, December 17, 2020, is frivolous. It is black letter law that statutes
 21 are presumptively limited to prospective-only application, absent a clear intent that the statute
 22

23 ³ Because under the ABC test, it is **presumed** that workers are employees, Amazon
 24 bears the burden of showing that Proposition 22 applies as an affirmative defense to liability.
Dynamex, 4 Cal. 5th at 955.

25 ⁴ Plaintiff does not expect that Amazon disputes this fact, and indeed, Amazon does not
 26 dispute this fact in its Opposition. Further, Amazon certainly does not require discovery on its
 own practice of assigning packages to Amazon Flex drivers to deliver.

1 is retroactive. See Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) (“the
 2 presumption against retroactive legislation is deeply rooted in our jurisprudence, and
 3 embodies a legal doctrine centuries older than our Republic.”); United States v. Security
 4 Industrial Bank 459 U.S. 70, 79-80 (1982) (“The principle that statutes operate only
 5 prospectively, while judicial decisions operate retrospectively, is familiar to every law
 6 student.... ‘retrospective operation will not be given to a statute which interferes with
 7 antecedent rights ... unless such be “the unequivocal and inflexible import of the terms, and
 8 the manifest intention of the legislature.”); Evangelatos v. Superior Court, 753 P.2d 585, 597
 9 (Cal. 1988) (the “common understanding [is] that legislative provisions are presumed to
 10 operate prospectively, and that they should be so interpreted ‘unless express language or clear
 11 and unavoidable implication negatives the presumption.’”) (internal citations omitted). This
 12 same principle applies to ballot initiatives. See, e.g., Robert L. v. Superior Court, 69 P.3d 894,
 13 900-01 (Cal. 2003) (“In interpreting a voter initiative ... we apply the same principles that
 14 govern statutory construction.”) (quoting Horwich v. Superior Court 980 P.2d 927 (Cal.
 15 1999)); Evangelatos, 753 P.2d at 598; Strauss v. Horton, 207 P.3d 48, 120-21 (Cal. 2009).

16 Under these general principles, it is clear that Proposition 22 does not apply
 17 retroactively. The ballot measure itself contains no express retroactivity provision, and the
 18 ballot summaries prepared by the California Attorney General lack any reference to
 19 retroactivity. Indeed, Proposition 22 does not even include language that *hints* that it was
 20 intended to be retroactive. Moreover, unlike AB5, which codified the Dynamex test in
 21 California, the Proposition 22 ballot measure does not contain any statement that it is a
 22 declaration of “existing” law.⁵ On the contrary, it is clear that Proposition 22 was intended by
 23 Uber and Lyft to change the law in California to the benefit of those companies (recognizing

24 ⁵ AB5 makes clear that its revisions to the Labor Code do not constitute a change in the
 25 law, but rather clarify existing law. See Cal. Lab. Code § 2785 (“(a) Section 2775 [which
 26 codifies the “ABC” test] does not constitute a change in, but is declaratory of, existing law
 with regard to wage orders of the Industrial Welfare Commission and violations of this code
 relating to wage orders.”).

1 that under Dynamex and AB5, their drivers are employees). The California Supreme Court
 2 has warned that when the proponents of a ballot initiative fail to include a retroactivity clause
 3 “perhaps in order to avoid the adverse political consequences that might have flowed from the
 4 inclusion of such a provision,” it would be “improper for this court to read [a retroactivity]
 5 clause into the enactment at this juncture.” Evangelatos, 33 Cal.3d at 1211-1212. In the
 6 absence of any language in the ballot measure or accompanying materials suggesting
 7 retroactivity, there is no evidence that voters intended the statute to be retroactive. Thus,
 8 Proposition 22 would at most impact claims that accrued **after** December 17, 2020.

9 Amazon also argues that Proposition 22 “abates and abrogates” AB5. See Opposition,
 10 at 21. This argument is plainly incorrect, and the cases cited by Amazon are off point, as they
 11 involve situations where a particular statutory provision was *expressly repealed*. See Younger
 12 v. Superior Court, 21 Cal. 3d 102, 109, 577 P.2d 1014 (1978); Physicians Com. for
 13 Responsible Med. v. Tyson Foods Inc., 119 Cal. App. 4th 120, 125 (2004)). Here, there has
 14 been no repeal of AB5.⁶ In fact, Proposition 22 does not contain any reference to a “repeal”,
 15 nor does it discuss AB5 at all. It is hard to imagine how Proposition 22 repealed a statute that
 16 it does not mention. Moreover, implied repeals are extremely disfavored and rarely found.
 17 See Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 569 (1998) (“The law
 18 shuns repeals by implication.”); Governing Board v. Mann, 18 Cal. 3d 819, 828 (1977)
 19 (“repeals by implication are not favored”); Medical Bd. v. Super. Ct. 88 Cal. App. 4th 1001,
 20 1013 (2001) (“In recognition of the courts’ constitutional role to construe, not write, statutes,
 21 [a]ll presumptions are against a repeal by implication.”) (internal citation omitted).⁷ The kind

22 ⁶ Further, Plaintiff Mack’s PAGA claims are only partially premised on AB5 in any
 23 case, as it was the 2018 Dynamex decision that first adopted the ABC test.

24 ⁷ Moreover, to meet its impossible burden to show that Proposition 22 impliedly
 25 repealed AB5, Amazon would have to argue that there is “*no possibility* of concurrent
 26 operation” and that Proposition 22 and AB5 are “irreconcilable”, and even then, “an implied
 repeal should not be found unless. . . the later provision gives *undebatable evidence* of an
 intent to supersede the earlier . . .” Western Oil & Gas Assn. v. Monterey Bay Unified Air
Pollution Control Dist., 49 Cal. 3d 408, 419-420 (1989) (emphasis in original). Here,
 Proposition 22 and AB5 can and do operate concurrently.

1 of extreme implied retroactivity that Amazon seeks to impose here is simply unprecedented.

2 III. CONCLUSION

3 As set forth above, Amazon Flex drivers in California undoubtedly perform work that
4 is within “the usual course” of Amazon’s business, by fulfilling Amazon’s orders. Under the
5 ABC test set forth in Dynamex and AB5, Amazon Flex drivers are thus Amazon’s employees.

6 The ABC test applies retroactively through Dynamex to wage and hour claims brought
7 under PAGA, and PAGA deputizes Plaintiff Mack to pursue relief for Amazon Flex drivers
8 who are unquestionably subject to AB5. Further, Amazon cannot show that the AB5
9 “business-to-business” exemption applies to any Amazon Flex drivers, nor does Proposition
10 22 create a defense for Amazon (and, even if it did, it is not retroactive).

11 The issue to be decided here is essentially a legal issue that can be decided on
12 summary judgment, as courts have routinely decided whether a particular category of worker
13 performs services within a defendant’s usual course of business (and thus whether the workers
14 are employees of the defendant under the ABC test) based upon common sense analysis.
15 There is no need for Amazon to conduct discovery to determine what business it is in.
16 Moreover, the facts Plaintiff Mack has put into the record through his declaration are not
17 controversial or subject to any serious dispute (nor did Amazon even attempt to dispute them
18 in its opposition to Plaintiff’s motion). There can simply be no question that Amazon Flex
19 drivers perform services within Amazon’s usual course of business.

20 The Court should thus grant Plaintiff Mack partial summary judgment on the issue of
21 Amazon Flex drivers’ employee status for purposes of his PAGA claim. The remaining
22 aspects of this PAGA claim will then solely need to focus on Amazon’s violation of the
23 underlying Labor Code violations (namely expense reimbursement and minimum wage
24 violations) and the appropriate amount of penalties to be assessed.

1 May 7, 2021

Respectfully submitted,

2
3 IAIN MACK, individually and in his capacity as
Private Attorney General Act Representative,

4 By his attorneys,

5 /s/ Shannon Liss-Riordan

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2021, I caused to be electronically filed the foregoing **PLAINTIFF IAIN MACK'S REPLY IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the registered attorneys of record.

/s/ Shannon Liss-Riordan

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